

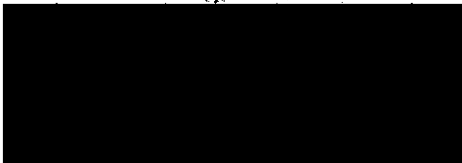


U.S. Department of Justice

Immigration and Naturalization Service

H4

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File [REDACTED] Office: Nebraska Service Center

Date: OCT 23 2000

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(A)(iii)

IN BEHALF OF APPLICANT:



Public Copy

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Terrance M. O'Reilly, Director  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The applicant is a native of Algeria and naturalized citizen of Canada who was found to be inadmissible to the United States under § 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. 1182(A)(7)(A)(i)(I), for having been found to be an immigrant without an immigrant visa or lieu document. Therefore, he is inadmissible under § 212(a)(9)(A)(i) of the Act, 8 U.S.C. 1182(a)(9)(A)(i). The applicant was removed from the United States on November 16, 1997 under § 235(b)(1) of the Act, 8 U.S.C. 1225(B)(1). He married a United States citizen in Canada on November 18, 1997 and is the beneficiary of an approved petition for alien relative. The applicant seeks permission to reapply for admission into the United States under § 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii), to join his wife.

The director determined that the unfavorable factors outweighed the favorable ones and denied the application accordingly.

On appeal, counsel submits a letter from the applicant's wife in which she states that the separation from her husband is causing incredible hardship and suffering. The applicant's wife states that she is taking medicine from deep depression and has had a blood clot on her subclavian vein and has been diagnosed with fibromyalgia. She also discusses the financial hardship caused by having to travel to Canada and having to make long distance telephone calls.

On appeal, counsel states that the applicant travelled in and out of the United States since December 1995 (although the applicant's New York driver's license was issued in October 1995) but never worked in the United States. Counsel indicates that the applicant visited friends in the United States and supported himself with money sent to him from Canada and through his own savings. He never remained in the United States for more than six months at a time. Counsel states that the applicant did not attempt to seek admission into the United States on November 16, 1997 as a nonimmigrant visitor. Counsel indicates that the Service report on Form I-213 was not accurate because the applicant sought admission under NAFTA based on advice that he should apply for that nonimmigrant status at the border. The applicant also was not searched, as stated in the Form I-213, but presented the documents when asked. Counsel states that the Service took a minimal statement from the applicant and asked why he wanted to go to the United States. The applicant honestly answered "to work" and stated that his fiancée was waiting for him.

Counsel argues that nowhere on the Form I-213 does it state that the applicant worked in the United States for two years; therefore, reliance on this as an unfavorable factor is in error. Counsel asserts that the Service's conclusion that the parties married to evade immigration laws is also incorrect. Counsel states that they met in 1996 and planned to marry in the spring of 1998. Counsel states that the parties married after the applicant was removed

from the United States and the petition for alien relative was not filed until nearly one year later.

The record reflects that the applicant applied for admission into the United States on November 11, 1997 at the Port of Entry in Blaine, Washington, as a nonimmigrant visitor. He was in possession of a California driver's license issued in September 1996, a New York driver's license issued in October 1995, a U.S. Social Security Card not valid for employment and a notice that a petition for nonimmigrant worker, filed in his behalf by the [REDACTED] as a cook's helper under NAFTA, had been denied on October 20, 1997.

Section 212(a)(9) ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(i) ARRIVING ALIENS.-Any alien who has been ordered removed under § 235(b)(1) [1225] or at the end of proceedings under § 240 [1229a] initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) EXCEPTION.-Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as § 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

Prior to 1981, an alien who was arrested and deported from the United States was perpetually barred. In 1981 Congress amended former § 212(a)(16) and (17) of the Act, 8 U.S.C. 1182(a)(16) and (17), eliminated the perpetual debarment and substituted a waiting period.

A review of the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has (1) increased the bar to admissibility and the waiting period from 1 to 5 years and 5 to 10 years respectively, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

The Service has held that an application for permission to reapply for admission to the United States may be approved when the applicant establishes he or she has equities within the United States or there are other favorable factors which offset the fact of deportation or removal at Government expense and any other adverse factors which may exist. Circumstances which are considered by the Service include, but are not limited to: the basis for removal; the recency of removal; the length of residence in the United States; the moral character of the applicant; the alien's respect for law and order; the evidence of reformation and rehabilitation; the existence of family responsibilities within the United States; any inadmissibility to the United States under other sections of the law; the hardship involved to the alien and to others; and the need for the applicant's services in the United States. Matter of Tin, 14 I&N Dec. 371 (Reg. Comm. 1973). An approval in this proceeding requires the applicant to establish that the favorable aspects outweigh the unfavorable ones.

It is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws. Evidence of serious disregard for law is viewed as an adverse factor. Matter of Lee, 17 I&N Dec. 275 (Comm. 1978). Family ties in the United States are an important consideration in deciding whether a favorable exercise of discretion is warranted. Matter of Acosta, 14 I&N Dec. 361 (D.D. 1973).

The court held in Garcia-Lopez v. INS, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. Ghassan v. INS, 972 F.2d 631 (5th Cir. 1992), cert. denied, 507 U.S. 971 (1993).

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity (referred to as "after-acquired family ties")

in Matter of Tijam, Interim Decision 3372 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight.

The applicant married after the conclusion of removal proceedings and after he had been removed to Canada. An equity gained in this manner will be given its full discretionary weight. Further, as indicated by counsel, the record is devoid of evidence that the applicant ever worked in the United States without Service authorization or remained longer than 6 months each time he entered. Therefore, absent evidence to the contrary, these issues will not be considered unfavorable factors.

The favorable factors in this matter are the applicant's family tie, the absence of a criminal record, his wife's medical problems, the approved petition for alien relative (although not present in the record) and the prospect of general hardship to the family.

The unfavorable factor in this matter is the applicant's removal from the United States.

It is concluded that the applicant has now established by supporting evidence that the favorable factors outweigh the unfavorable ones. Therefore, the director's decision will be withdrawn.

In discretionary matters, the applicant bears the full burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957); and Matter of Ducret, 15 I&N Dec. 620 (BIA 1976). After a careful review of the record, it is concluded that the applicant has established he warrants a favorable exercise of the Attorney General's discretion. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained. The director's decision is withdrawn, and the application is approved.